(14)

FILED
AUG 6 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 236

UNITED STATES ex rel. WALTER GUTTERSON,
Relator,

against

E. E. THOMPSON, Warden of the United States House of Detention at 427 West Street, New York City,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

DAVID SAPERSTEIN,
Counsel for Petitioner.

INDEX

SUBJECT INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI 1

Summary and Short Statement of Matter Involved 1

Facts Involved 2

Jurisdiction 3

Questions presented:

1. Whether the execution of the retaking warrant eleven months after the expiration of the maximum term of petitioner's sentence is valid 4

2. Whether the Board of Parole retained jurisdiction over petitioner after the date when the maximum term of his sentence expired 4

Reasons relied on for allowance of writ:

1. Diversity of opinions 4

2. Present case differs from those in which parolee has been imprisoned for another offense while on parole 4

Prayer 5

BRIEF IN SUPPORT OF PETITION 7

Opinions of the Courts Below 7

Jurisdiction 7

Statement of Case 7

PAGE

Specification of errors:

1. Courts below erred in holding that execution of warrant eleven months after expiration of sentence was valid 8

2. Courts below erred in holding that Board of Parole retained jurisdiction after expiration of sentence 8

Summary of Argument 8

Argument:

POINT I—Petitioner was no longer on parole after July 20, 1941, the date when the maximum term of his sentence expired. The Board of Parole lost jurisdiction over him after that date. His detention is, therefore, unlawful and without legal authority 8

Conclusion 15

TABLE OF CASES CITED

	PAGE
Adams v. Hudspeth, 121 F. (2d) 270	12
Anderson v. Corall, 263 U. S. 193	13
Anderson v. Williams, 279 F. 822	4, 9, 11, 13
Clark v. Suprenant, 94 F. (2d) 969	4, 10, 11, 14
Henratty v. Zerbst, 9 Fed. Supp. 230	4, 9, 11, 13
Hogan v. Zerbst, 101 F. (2d) 634	14

STATUTES CITED

Judicial Code:

Section 240(a), as amended by Act of February 13, 1925 — 3

United States Code, Title 18:

Section 710 — 3, 11
Section 716b — 11
Section 717 — 9
Section 719 — 3, 9
Section 723c — 3

Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES ex rel. WALTER GUTTERSON, Relator, against E. E. THOMPSON, Warden of the United States House of Detention at 427 West Street, New York City, Respondent.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, WALTER GUTTERSON, relator, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review an order of that Court entered on May 17, 1943.

Summary and Short Statement of the Matter Involved

On June 15, 1942, petitioner was taken into the custody of respondent as a parole violator, under a warrant that had been issued on July 18, 1941. On July 30, 1942, a petition for a writ of habeas corpus on behalf of petitioner was verified by his wife, and a writ of habeas corpus issued on July 31, 1942, returnable on August 3, 1942 (R. pp. 2-5).

A return to the writ was made on behalf of respondent on August 12, 1942 (R. pp. 6-8). A traverse to the return was served and filed on behalf of petitioner on August 12, 1942 (R. pp. 8-9). Petitioner was released in $1,000 bail on August 12, 1942, pending the decision on the said writ.

An order dismissing the writ of habeas corpus and remanding petitioner to the custody of respondent was signed herein on November 2, 1942, and entered on November 5, 1942 (R. pp. 18-19).

Notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from the order dismissing the writ of habeas corpus was served and filed on behalf of petitioner on November 6, 1942 (R. p. 20). On November 9, 1942, petitioner was released in $2,000 bail, pending the hearing and determination of that appeal (R. pp. 21-22).

On May 17, 1943, the United States Circuit Court of Appeals for the Second Circuit affirmed the order below dismissing the writ.

Facts Involved

On June 29, 1938, in the United States District Court for the Southern District of New York, petitioner was convicted of the crime of using the mails to defraud, and was sentenced to three years' imprisonment at the United States Penitentiary at Lewisburg, Pennsylvania (R. p. 3). As part of this sentence petitioner was also put on probation for two years, to commence at the expiration of his prison term. He began to serve his sentence on July 23, 1938. On November 10, 1940, petitioner was granted a parole for the remainder of the term of his sentence (R. p. 3). The full three-year term of the sentence expired on July 20, 1941.

From November, 1940, petitioner reported to the United States Board of Parole in Brooklyn, New York, regularly every month and filed his parole reports (R. p. 3). Beginning with September, 1941, and monthly thereafter, the United States Board of Parole required that petitioner file

reports of probation instead of parole reports, which petitioner did (R. p. 9).

On July 18, 1941, just three days before the expiration of petitioner's three-year sentence in full, a warrant for his arrest was issued by the Board of Parole for an alleged violation of the conditions of his release (R. p. 3). The warrant remained unexecuted until June 15, 1942, almost one year after the expiration of petitioner's maximum three-year term.

Respondent's return to the writ asserts that the warrant for petitioner's arrest was issued by the Board of Parole by reason of his arrest in the City of New York on June 15, 1941, on a charge of grand larceny in effecting the sale of a certain trust certificate (R. p. 7). However, on September 18, 1941, this charge was dismissed (R. p. 7).

Directly after the dismissal of this charge, petitioner was arrested on a technical misdemeanor charge, the information charging that the sale of the trust certificate constituted a violation of a civil injunction order which had been obtained against petitioner, on his consent (R. p. 7). Petitioner was paroled in the custody of his counsel. He had kept the Board of Parole fully advised of these proceedings and continued to report to the Board regularly. On June 15, 1942, while the case against petitioner remained undisposed of, he was arrested on the original warrant, issued July 18, 1941.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The retaking warrant was issued under the authority of Title 18 of the United States Code, Sections 717, 719 and 723c.

The date of the order which petitioner seeks to have reviewed is May 17, 1943.

Questions Presented

(1) Whether the execution of the retaking warrant eleven months after the expiration of the maximum term of petitioner's sentence is valid.

(2) Whether the Board of Parole retained jurisdiction over petitioner after the date when the maximum term of his sentence expired.

Reasons Relied On for the Allowance of the Writ

Petitioner prays that the writ herein be allowed for the reasons that:

(1) The decisions herein of the United States Circuit Court of Appeals for the Second Circuit and of the United States District Court for the Eastern District of New York are in conflict with the cases which hold that a retaking warrant must be executed by the Board of Parole within the maximum term of the sentence. *Clark* v. *Suprenant,* 94 F. (2d) 969; *Anderson* v. *Williams,* 279 F. 822; *Henratty* v. *Zerbst,* 9 Fed. Supp. 230.

(2) The situation here differs from those in which a parolee has been imprisoned for another offense during the time he has been on parole. Petitioner here was available at all times from the date of the issuance of the retaking warrant to the date of the expiration of his maximum sentence for the timely execution of the warrant.

Prayer

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to the end that the cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Second Circuit be reversed; that petitioner's application for a writ of habeas corpus be granted; and that petitioner be granted such other, further and different relief as to this Court may seem proper.

Dated: New York City, New York, July 31, 1943.

WALTER GUTTERSON,
Petitioner.

DAVID SAPERSTEIN,
Counsel for Petitioner.

PETITIONER'S BRIEF

Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES ex rel. WALTER GUTTERSON, Relator, against E. E. THOMPSON, Warden of the United States House of Detention at 427 West Street, New York City, Respondent.	No.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of New York was filed October 23, 1942, and is reported in 47 F. Supp. 150.

The per curiam opinion of the United States Circuit Court of Appeals for the Second Circuit was filed on May 17, 1943, and has not yet been reported, so far as is known.

Jurisdiction

Stated in the petition (p. 3).

Statement of Case

The foregoing petition contains a statement of the material facts, as well as a statement of the questions involved.

Specification of Errors

(1) The United States Circuit Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York erred in holding that the execution of the retaking warrant eleven months after the expiration of the maximum term of petitioner's sentence was valid.

(2) The United States Circuit Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York erred in holding that the Board of Parole retained jurisdiction over petitioner after the date of expiration of the maximum term of his sentence.

Summary of Argument

Petitioner was no longer on parole after July 20, 1941, the date when the maximum term of his sentence expired. The Board of Parole lost jurisdiction over him after that date. His detention is, therefore, unlawful and without legal authority.

POINT I

Petitioner was no longer on parole after July 20, 1941, the date when the maximum term of his sentence expired. The Board of Parole lost jurisdiction over him after that date. His detention is, therefore, unlawful and without legal authority.

Under our Parole Laws, it is fundamental that a prisoner may earn the right to conditional release or parole. Such parole is by no means tantamount to freedom. It is, in fact,

a continuation of an ameliorated detention. To all intents and purposes a paroled prisoner is still serving his sentence when on parole but is no longer confined to the metes and bounds of a prison. However, he may still be restricted both in area and conduct for he is still deemed to be in legal custody.

Anderson v. *Williams,* 270 F. 822.
Henratty v. *Zerbst,* 9 Fed. Supp. 230.

If, while on parole, a prisoner violates the requirements of his now lesser restricted imprisonment, he is subject to recall by the Warden of the prison in which he had been confined, or by the Board of Parole. This is a pronouncement of the prevailing statute.

18 U. S. C. A. Sec. 717 provides:

"§717. SAME; VIOLATION OF PAROLE; WARRANT FOR RETAKING PRISONER.

If the warden of the prison or penitentiary from which said prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner (June 25, 1910, c. 387, § 4, 36 Stat. 820)."

It is noteworthy that this section confines a warden in the issuance of a retaking warrant to the duration of the original term of sentence. And rightfully so, for upon revocation of parole a prisoner must re-serve all of the time he has served while on parole.

18 U. S. C. A. Sec. 719 provides:

"If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the

time the prisoner was out on parole shall not be taken into account, to diminish the time for which he was sentenced. As amended May 13, 1930, c. 255, § 1, 46 Stat. 272; June 29, 1940, c. 449, § 3, 54 Stat. 692."

These statutes are penal and must be strictly construed according to their tenor. Their requirements are clear. They are not meant to continue the jurisdiction of the Board of Parole over a prisoner after his sentence expires any more than the authorities of a prison are meant to have jurisdiction over a prisoner upon completion of sentence. To hold otherwise would make a parolee accountable to his Parole Board ad infinitum.

The term of sentence of the petitioner expired almost a year before the execution of the warrant. To deem such an arrest proper would mean that an arrest under a warrant four, six or even ten years after expiration of sentence would likewise be proper. A prisoner on parole, then, would be far worse off than a prisoner who never earned a parole.

Clark v. *Suprenant,* 94 F. (2d) 969, is exactly in point with the case at bar. There, appellee had been sentenced for a term of fifteen months which expired on July 14, 1936. In April of 1936 he was released, having earned "good time" under the provisions of 18 U. S. C. A. Sec. 710. On July 13, 1936, a few hours before the expiration of his maximum term, a warrant for his arrest was issued for violation of the conditions of his release. This warrant was executed on August 29, 1936, a month and a half after the end of the term of sentence. The Court sustained a writ of habeas corpus, holding that "jurisdiction to revoke paroles is thereby (18 U. S. C. A. Sec. 716b) exclusively conferred upon the Board of Parole only if action is taken before 'the expiration of the maximum term or terms specified in his sentence'" (at p. 973).

Obviously, by the word "action" the Court meant the execution of the warrant, not merely its issuance.

The Court in the *Clark* case considered the pertinent statutes at length and concluded from their terms "that

the Congress did not intend by this act to vest and did not vest in the Board the power to revoke such a parole after the parole and the term of imprisonment had expired, and thereby to enable it at any time, perhaps years after the termination of both, to invoke upon the prisoner another term of confinement in the penitentiary for a length of time equal to that part of his sentence which he served under the parole, * * *" (at p. 973).

The case of *Anderson* v. *Williams,* 279 F. 822, is likewise analogous to the case at bar. There, the prisoner's term expired on November 18, 1917. He had been paroled in 1914. In 1919 his parole was revoked and he was recommitted. The Court granted his release and said:

> "As these appellees served part of their sentences in the penitentiary and the remainders thereof under the authorized amelioration of their sentences wrought by their paroles, but still in the legal custody and under the control of the warden, and all this time subject to the revocation of their paroles, it is difficult to resist the conclusion that as soon as the times prescribed by their sentences had passed, the authority of the board to revoke their paroles and again to cause them to be imprisoned under their sentences had also passed" (at p. 834).

The language of the Court in *Henratty* v. *Zerbst* (1934), 9 Fed. Supp. 230, is likewise clear that a warrant must be executed by the Board of Parole within the terms of the sentence. There, the Court said:

> "The Board has no power to recommit a prisoner after his sentence is fully served. The statute contains the power of the Board to retake a parole prisoner to the time 'within the term * * * of the prisoner's sentence'" (at p. 231).

Indeed, the Court went much further in the *Henratty* case, supra. There, the Court held that a paroled prisoner is entitled to have taken into consideration any "good time" allowance he may have been granted, and limited the con-

trol of the warden over him to the term of his sentence less his "good time" allowance. The Court said that:

> "Neither the Board of Parole nor the Court can breathe life into a sentence which has been finally terminated" (p. 232).

No stronger argument can be given in the instant situation that petitioner's parole had expired before the warrant was executed than that evidenced by the conduct of the Board of Parole itself. It is manifest from the record that as early as September, 1941, the Board of Parole concluded that petitioner was no longer on parole. It was in that month that the Board directed petitioner to file a probation report and not a parole report for the month of August, 1941. The only conceivable reason for this instruction is that petitioner from that time forward was required to carry out the probation phase of his sentence, and that parole had been concluded. The Board of Parole is estopped from changing its own procedure.

Respondent has sought to liken the situation at bar with those cases which hold that where a prisoner commits another offense while on parole, and during parole is confined in prison for the commission of this latter offense, a warrant for the revocation of his parole may be held in abeyance until he is released from prison. We are mindful of the line of cases so holding but the reasons for them are obvious. As said the Court in *Adams* v. *Hudspeth*, 121 F. (2d) 270:

> "During the period for which appellant was sentenced for the new and different offense, he was not in legal custody of the Warden upon the parole violator's warrant. Jurisdiction of the Board of Parole over the appellant under the original sentence was effectively interrupted and suspended by his confinement under the latter offense. Service of the two sentences was not concurrent. He occupied the legal status of an escaped convict, or as if he had not been apprehended. Anderson v. Corall, 263 U. S. 193, 196, 44 S. Ct. 43, 69 L. Ed. 247; Zerbst v. Kidwell, 304

U. S. 359, 58 S. Ct. 872, 82 L. Ed. 1399, 116 A. L. R. 808; United States v. Dillard, 4 Cir., 102 F. 2d 94; Hogan v. Zerbst, 5 Cir., 101 F. 2d 634; Aderhold v. Ashlock, 10 Cir., 99 F. 2d 67; Stockton v. Massey, 4 Cir., 34 F. 2d 96, and Ducey v. Hill, D. C., 28 F. Supp. 347" (at p. 272).

Such is not the situation here. First, the Board of Parole terminated petitioner's parole some nine months prior to the execution of the warrant and proceeded with his probation. They must have considered that petitioner was no longer on parole. He was not imprisoned for any new offense. He was always subject to the jurisdiction of the Board. He was available for arrest at any time, for he reported monthly continually until June, 1942.

The difference between the execution of a tardy warrant against one who has been imprisoned for another offense while on parole and one who has not is brought home by the case of *Anderson* v. *Corall,* 263 U. S. 193, which was heard and decided along with *Anderson* v. *Williams,* supra.

As has been hereinbefore mentioned, Williams was released on a writ of habeas corpus, on the ground that the warrant was executed after his sentence had expired. Corall was likewise released. Williams had not been imprisoned for any new offense while he was on parole. Corall had been. An appeal was taken in the *Corall* case and the judgment releasing him reversed. The judgment releasing Williams still stands. The Court said in *Henratty* v. *Zerbst,* 9 Fed. Supp. 230, in referring to the *Williams* and *Corall* cases:

> "This circumstance is significant. The Williams case was decided in the same opinion as the Corall case. Certiorari was granted in the Corall case and the Court of Appeals reversed, but the judgment in the Williams case became final" (at pp. 232 and 233).

In short, it may be said that a tardy warrant is valid when the jurisdiction of the Board of Parole is inter-

rupted by the act of the parolee, such as confinement for another offense. The rule is the same where the parolee absconds or hides or is otherwise not amenable to process. But this is not true here, where the parolee was available at all times and regularly reported to the Board.

The Courts below held in their opinions that the petitioner came within the purview of *Hogan* v. *Zerbst,* 101 F. (2d) 634 (R. p. 15).

It is submitted that the *Hogan* case is not parallel with the one at bar and differs in its essentials. From the statement of facts in the opinion in that case it is clear that when the parole warrant was issued Hogan was in jail on another charge. The opinion specifically states that the parole warrant was lodged with the State Sheriff as a detainer on July 23, 1935. Hogan's maximum sentence expired on November 6, 1935. It is clear, then, that the Board of Parole in that case not only issued the warrant for parole violation before the maximum sentence expired, but executed it in the only way possible before expiration of the maximum sentence by lodging a detainer in the jurisdiction where Hogan was then detained. The *Hogan* case merely follows the long line of decisions which hold that imprisonment on another charge will toll the time for the Board to execute its warrant. However, in all of these cases it must be borne in mind that the Board either executed the warrant in time or performed an overt act tending in that direction, to wit, the lodging of a detainer. Neither was done in the case at bar.

As observed the Court in *Clark* v. *Suprenant,* supra, with respect to the remedy of habeas corpus in these cases:

> "On the general principles governing the law of habeas corpus, the conclusion is irresistible that this is a proper case for the application of that remedy. We do not see that appellee has another remedy that would be adequate and speedy" (94 Fed. [2d] 974).

CONCLUSION

In conclusion, it is respectfully urged that the Courts below have erred in dismissing petitioner's writ of habeas corpus. Accordingly, a writ of certiorari should issue to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court.

Respectfully submitted,

DAVID SAPERSTEIN,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Adams v. *Hudspeth*, 121 F. (2d) 270	7
Anderson v. *Corall*, 263 U. S. 193	7, 10
Application of Gillard, 105 Nebr. 84	5
Boles, In re, 48 Fed. 75	5
Campbell v. *Bishop*, 47 F. (2d) 95	10
Fong Yim, Ex parte, 134 Fed. 938	5
Furrow v. *United States*, 46 F. (2d) 647	10
Gouget, Ex parte, 175 Fed. 230	5
Hogan v. *Zerbst*, 101 F. (2d) 634	7, 9
Jianole v. *United States*, 58 F. (2d) 115	9
Jones v. *Biddle*, 131 F. (2d) 853, certiorari denied, 318 U. S. 784	5
Mayen, Ex parte, 49 Cal. App. 531	5
Platek v. *Aderhold*, 73 F. (2d) 173	7
Riggs v. *United States*, 14 F. (2d) 5, certiorari denied, 273 U. S. 719	10
Simmons v. *Georgia Iron and Coal Co.*, 117 Ga. 305	5
State ex rel. Shirley, 20 Ala. App. 473	5
United States ex rel. Belardi v. *Day*, 50 F. (2d) 816	5
United States v. *McNeil*, 69 F. (2d) 107	5
United States ex rel. Rubin v. *Powell*, 1 F. R. D. 644	5
Yee Hick Ho, Ex parte, 33 F. (2d) 360	5
Zerbst v. *Kidwell*, 304 U. S. 359	7, 10

Statutes:

18 U. S. C. 710, 713	4
18 U. S. C. 716b	4
Parole Act of June 25, 1910, 36 Stat. 820, as amended, Secs. 4 and 6, 18 U. S. C. 717, 719	2, 6, 7, 9
Act of May 13, 1930, Sec. 3, 46 Stat. 272, 18 U. S. C. 723c	2
18 U. S. C. 727	9

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 236

UNITED STATES EX REL. WALTER GUTTERSON, PETITIONER

v.

E. E. THOMPSON, WARDEN OF THE UNITED STATES HOUSE OF DETENTION AT 427 WEST STREET, NEW YORK CITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 24) is not yet reported. The opinion of the district court (R. 10–18) is reported at 47 F. Supp. 150.

JURISDICTION

The judgment of the circuit court of appeals was entered June 2, 1943 (R. 25). The petition for a writ of certiorari was filed August 6, 1943. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Board of Parole has power, subsequent to the time when the term of a parolee's sentence would otherwise have expired, to execute a retaking warrant issued during the term upon reasonable cause to believe that he had violated his parole in that he had been charged with the commission of a state offense, when in the interim the state charge remained pending against him and he had been in technical custody under that charge.

STATUTE INVOLVED

Sections 4 and 6 of the Parole Act of June 25, 1910, 36 Stat. 820, as amended, 18 U. S. C. 717, 719, provide:

> SEC. 4. If the warden of the prison or penitentiary from which the prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same for the retaking of such prisoner.[1]
>
> SEC. 6. When a prisoner has been retaken upon a warrant issued by the Board

[1] Section 3 of the Act of May 13, 1930, 46 Stat. 272, 18 U. S. C. 723c, vested exclusive authority to issue retaking warrants in the Board of Parole.

of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced.

STATEMENT [2]

On June 29, 1938, petitioner was convicted of using the mails in the execution of a scheme to defraud and was sentenced to three years' imprisonment.[3] He began service of his sentence on

[2] The record on appeal consists merely of the petition for a writ of habeas corpus, the writ itself, the return thereto, petitioner's traverse to the return, the opinion of the district court, and its order dismissing the writ. The record contains no findings of fact and the case was apparently disposed of below on the theory that the essential facts were not in dispute and that there was presented for decision only a question of law. This statement is therefore predicated primarily upon the facts recited in the pleadings and the opinion of the district court, but we have supplemented the record facts with certain explanatory matter appearing in the files of the Board of Parole as to which the record here is silent.

[3] Petitioner states in his petition for a writ of certiorari (p. 2) that as part of his sentence he was also placed on probation for two years, to commence at the expiration of his imprisonment sentence.

July 23, 1938, and the full term was scheduled to expire on July 20, 1941. On November 10, 1940, he was released on parole. (R. 3, 10.)[4] While so on parole, petitioner was arrested and admitted to bail upon a New York State charge of grand larceny. Thereafter, on July 18, 1941, two days prior to the scheduled expiration of the full term of petitioner's sentence, the Board of Parole issued a retaking warrant for his arrest, charging him with violation of his parole in committing the act which was the basis of the State charge. Petitioner remained on bail on the State charge until September 18, 1941, when it was dismissed. (R. 6–7, 16.) On the same date petitioner was arraigned on a State misdemeanor charge arising out of the same transaction. Pending disposition of the latter charge he was released by the State court in the custody of his counsel. (R. 7, 16.) On June 15, 1942, while so in custody and prior to trial on the misdemeanor charge, petitioner was arrested pursuant to the Parole Board's retaking warrant issued July 18, 1941, and was placed in the custody of respondent, who is the Warden of Federal Detention Headquarters at 427 West St., Borough of Manhattan, New York City (R. 6, 7, 16), which is located in the Southern District of New York.

[4] The Parole Board's file discloses that petitioner was conditionally released on that date pursuant to the provisions relating to deductions for good conduct (18 U. S. C. 710, 713). Under 18 U. S. C. 716b a prisoner so released is treated as on parole until the expiration of the maximum term of his sentence.

Throughout the period from the date of his release on parole until he was arrested on the retaking warrant, petitioner regularly reported to the Parole Board in Brooklyn, New York (R. 3).

On July 30, 1942, petitioner's wife filed in the District Court for the Eastern District of New York a petition for a writ of habeas corpus alleging that the Parole Board had lost jurisdiction over petitioner because the term of his sentence had expired prior to the execution of the retaking warrant (R. 2–4). The writ issued (R. 5), and in response thereto respondent caused petitioner to be produced before the court and filed a return (R. 6–8), to which petitioner filed a traverse (R. 8–9).[5] The district court, on November 2, 1942,

[5] Since the place of petititoner's detention was in the Southern, not the Eastern, District of New York, it would seem clear that the writ of habeas corpus was subject to a motion to quash by respondent. *Jones* v. *Biddle*, 131 F. (2d) 853, 854 (C. C. A. 8), certiorari denied, 318 U. S. 784; *United States* v. *McNeil*, 69 F. (2d) 107, 108 (C. C. A. 3); *United States ex rel. Belardi* v. *Day*, 50 F. (2d) 816, 818 (C. C. A. 3); *Ex parte Yee Hick Ho*, 33 F. (2d) 360, 361 (N. D. Cal.); *Ex parte Gouyet*, 175 Fed. 230, 233 (D. Mont.); *In re Boles*, 48 Fed. 75, 76 (C. C. A. 8); *United States ex rel. Rubin* v. *Powell*, 1 F. R. D. 644 (S. D. N. Y.). Respondent, however, appeared generally and produced petitioner pursuant to the writ (R. 6–8). There is some authority for the proposition that in these circumstances the court acquires jurisdiction (see *Ex parte Fong Yim*, 134 Fed. 938, 939 (S. D. N. Y.); see also *Application of Gillard*, 105 Nebr. 84 (1920); *Ex parte Mayen*, 49 Cal. App. 531 (1920); *State ex rel. Shirley*, 20 Ala. App. 473 (1925); *Simmons* v. *Georgia Iron and Coal Co.*, 117 Ga. 305 (1903)), and we have found no authority to the contrary. In view of this, although the question is not free from doubt, we do not press it.

dismissed the writ and remanded petitioner to respondent's custody (R. 18–19), holding that since petitioner was in technical State custody from the time the retaking warrant was issued, the authority of the Parole Board continued beyond the time when the term of his sentence would have expired but for the issuance of the warrant (R. 10–18). Petitioner was released on bail pending appeal (R. 1–2, 21–22).[6]

On appeal to the Circuit Court of Appeals for the Second Circuit the judgment of the district court was affirmed *per curiam* (R. 24, 25).[7]

---

[6] Although not shown by the record, the Department files show that petitioner was also released on bail by the district court pending its disposition of the petition for a writ of habeas corpus. The Department files also show that on August 13, 1943, upon receipt of the mandate of the circuit court of appeals affirming the judgment of the district court, the latter court terminated petitioner's bail and ordered him surrendered to the custody of respondent. Since the Parole Board has revoked petitioner's parole (see note 7, *infra*), he must serve the remainder of his sentence (18 U. S. C. 719, *supra*, p. 3), which we estimate to be approximately six and one-half months, petitioner having been incarcerated pursuant to the retaking warrant for about six weeks prior to the filing of the petition for a writ of habeas corpus (*supra*, pp. 4–5).

[7] The record here does not disclose whether petitioner appeared before the Board of Parole after he was arrested on the retaking warrant or whether the Board revoked, terminated, or modified the terms or conditions of his parole, as contemplated by the statute (18 U. S. C. 719, *supra*, pp. 2–3). There is, however, no issue in the case in respect of any nonaction of the Board in this regard. In fact, as the Parole Board's file shows, the Board revoked petitioner's parole on August 3, 1942.

ARGUMENT

There is no merit in petitioner's contention (Pet. 8–14) that the Board of Parole was without authority to cause its retaking warrant to be executed after the lapse of a period of time equivalent to the term of his sentence. A violation of parole suspends the running of the parolee's sentence and, accordingly, the authority of the Board to retake him, upon its warrant seasonably issued in conformity with the terms of the statute,[8] may continue beyond the time when his sentence would have expired had he not violated his parole. *Zerbst* v. *Kidwell*, 304 U. S. 359, 361–363; *Anderson* v. *Corall*, 263 U. S. 193, 196; *Adams* v. *Hudspeth*, 121 F. (2d) 270, 272 (C. C. A. 10); *Hogan* v. *Zerbst*, 101 F. (2d) 634 (C. C. A. 5); *Platek* v. *Aderhold*, 73 F. (2d) 173 (C. C. A. 5).

Petitioner concedes (Pet. 12–13) that if a parolee is convicted and sentenced to imprisonment for another offense while on parole, his legal status is analogous to that of an escaped convict,[9] and that a retaking warrant seasonably issued during the term of his original sentence may be executed upon his release from imprisonment for the second crime, even though the time may have passed at which, had he not been paroled, service of the original sentence would have been completed. See cases cited, *supra*.

[8] 18 U. S. C. 717, *supra*, p. 2.

[9] See *Zerbst* v. *Kidwell*, 304 U. S., at 361.

Petitioner, however, claims that these cases, and the principles they enunciate, are inapplicable here, (1) because the Board of Parole had terminated his parole prior to the execution of the retaking warrant, and (2) because he was available for arrest at all times subsequent to the issuance of the warrant. Neither of these attempted bases of distinction is sound.

(1) The record basis for petitioner's assertion that the Board had terminated his parole is the allegation in his traverse to respondent's return to the writ of habeas corpus that, "Beginning with September 1941 and continuously until and including June 1942, the United States Board of Parole voluntarily abandoned the requirement that the Relator file a Parole Report and instead required that the Relator file a report of Probation, which the Relator did and the United States Board of Parole accepted" (R. 9). However, as appears from the petition for a writ of certiorari (p. 2), petitioner was, under the terms of his original sentence, to serve two years on probation to follow the imprisonment sentence. That sentence had been scheduled to expire on July 20, 1941. In September 1941 the New York State charge, which occasioned the issuance of the retaking warrant, was still pending against petitioner and because of that the Board had taken no action on its warrant (see note 11, p. 10, *infra*). In view of the contingency that the Board might ultimately have concluded that petitioner had not

violated his parole, it was appropriate that he should have been treated as a probationer, in accordance with the terms of his sentence, pending final disposition of the charge of parole violation.[10] Clearly this action did not divest the Board of its authority to proceed against petitioner as a parole violator.

(2) In respect of petitioner's contention (Pet. 13–14) that he was "available for arrest at any time" subsequent to the issuance of the retaking warrant, the record shows that he was at all times prior to the execution of the warrant in the technical custody of the State of New York on a charge which was the very basis of the Board's warrant. Certainly, the Board would have been entitled to await the final disposition of that charge, for the result would have been relevant in the Board's determination whether petitioner had violated his parole. Cf. *Hogan* v. *Zerbst*, 101 F. (2d) 634 (C. C. A. 5). But it is equally true that the Board was not required to postpone its determination until the disposition of the State charge, since, in any event, it would not have been bound by the judgment of the State court. See 18 U. S. C. 719; *Hogan* v. *Zerbst, supra,* at 634–635; cf. *Jianole* v. *United States,* 58 F. (2d) 115,

[10] Moreover, the Parole Board's file indicates that petitioner's parole reports were submitted to the Probation Officer for the Eastern District of New York, who was acting for the Board (cf. 18 U. S. C. 727), and that he continued after September 1941 to report as a probationer to the same officer.

117–118 (C. C. A. 8); *Campbell* v. *Bishop*, 47 F. (2d) 95, 97 (C. C. A. 5); *Furrow* v. *United States*, 46 F. (2d) 647 (C. C. A. 4); *Riggs* v. *United States*, 14 F. (2d) 5, 12 (C. C. A. 4), certiorari denied, 273 U. S. 719. In the instant case the Board did wait for almost a year before executing its warrant and the State charge had not even then been finally determined.[11] Petitioner's contention, therefore, amounts to no more than a complaint that he has been harmed because the Board treated him less severely than it could have.

CONCLUSION

The case was correctly decided below and involves no real conflict of decisions[12] or important question of law. We therefore respectfully submit

[11] The Parole Board's file shows that trial of the State charge was repeatedly continued and we are advised that it was not until January 1943 that the State proceeding was terminated by a judgment of conviction. This judgment sentenced petitioner to a fine, which was paid, and also placed him on probation. It was affirmed on appeal on May 10, 1943. Furthermore, the Board's file indicates that petitioner himself requested the Board to withhold action on its warrant until he had had an opportunity to prove his innocence on the State charge.

[12] The cases relied upon by petitioner (Pet. 10–13) are not only readily distinguishable on their facts, but insofar as they contain language which appears to support his position that the Parole Board in the circumstances of this case was without power to execute its retaking warrant after the expiration of the term of the imprisonment sentence, they are inconsistent with the rationale of this Court's decisions in *Zerbst* v. *Kidwell*, 304 U. S. 359, and *Anderson* v. *Corall*, 263 U. S. 193.

that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
Special Assistant to the Attorney General.
MALCOLM A. HOFFMANN,
W. MARVIN SMITH,
Attorneys.

SEPTEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE, 1943